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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 NEOFONIE GMBH, a German
15 corporation,

16 Plaintiff,

17 vs.

18 ARTISSIMO DESIGNS LLC, a
19 Delaware limited liability company,

20 Defendant.

21
22 Case No.: 8:17-cv-00772 CJC
(JDE)

23 DEFENDANT/COUNTER-
PLAINTIFF'S MEMORANDUM
24 OF POINTS AND AUTHORITIES
IN SUPPORT OF ITS MOTION *IN
LIMINE* #1 TO EXCLUDE
EXPERT TESTIMONY OF ALI
KHOSHGOZARAN, PH.D

25
26 Hearing Date: October 7, 2019
Hearing Time: 3:00pm
Courtroom: 7C

27 The Honorable Cormac J. Carney

28 ARTISSIMO DESIGNS LLC,

Counter-Plaintiff.

vs.

NEOFONIE GMBH

Counter-Defendant.

1 Defendant/Counter-Plaintiff Artissimo Designs LLC (“Artissimo”)
 2 respectfully submits this Memorandum of Points and Authorities under
 3 L.R. 7-5 in support of its Motion to Exclude Expert Testimony of Ali
 4 Khoshgozaran, Ph.D., proposed expert witness of Plaintiff/Counter-
 5 Defendant Neofonie GMBH (“Neofonie”), on the basis that his opinions
 6 are not reliable, not helpful to the trier of fact, and/or are based on
 7 documents that Neofonie has not produced, as explained further below.

8 **I. INTRODUCTION**

9 Dr. Khoshgozaran’s report (Ex. A) lists five essential opinions about
 10 the subject matter of this case. However, these opinions should not be
 11 presented to the jury for the reasons that follow.

12 *First*, Dr. Khoshgozaran’s opinion that Artissimo “failed to conform
 13 to important principles of Agile software development and MVP launch” is
 14 neither reliable nor helpful to the trier of fact. Dr. Khoshgozaran formed
 15 this opinion by analyzing *one* out of 46 features required for the Project—
 16 an inherently unreliable methodology, as such a small sample size could
 17 not generate a reliable conclusion. Additionally, Dr. Khoshgozaran
 18 explains how the design and progress of this project failed to conform to
 19 the “industry standard” definition of a minimum viable product (“MVP”).
 20 But the question here is not whether the project conformed to some general
 21 idea of an MVP, but rather whether the project conformed to the
 22 contractual definition for *this* MVP. As a matter of law, the contractual
 23 definition controls over the industry standard, and a discussion of “industry
 24 standard” is therefore immaterial and likely to confuse, not assist, the jury.
 25 Moreover, Dr. Khoshgozaran’s analysis does not support his conclusion.
 26 Dr. Khoshgozaran explains that the agreement itself does not comport with
 27 industry standards, but that does not lead to the conclusion that Artissimo
 28 “failed to conform” to industry standards.

1 **Second**, Dr. Khoshgozaran’s opinions as to Neofonie’s use of best
 2 practices and implementation of out-of-the box solutions vs. customization
 3 should be excluded because they are not relevant. These opinions are
 4 expressly given to rebut Artissimo’s assertions that Neofonie did not use
 5 industry best practices and did not implement out-of-the-box solutions
 6 where available. But Artissimo is not pursuing these theories at trial and
 7 this rebuttal testimony therefore is not relevant.

8 **Third**, Dr. Khoshgozaran’s opinion that the bugs present in the
 9 website were not as severe as Artissimo portrayed should be excluded
 10 because it is not reliable, does not assist the jury, and the risk of prejudice
 11 significantly outweighs the probative value of his opinions. Dr.
 12 Khoshgozaran failed to test the website and therefore cannot reliably opine
 13 as to the severity of the deficiencies Artissimo identified. Instead of testing
 14 the site, Dr. Khoshgozaran weighed the credibility of others’ opinions of
 15 the severity of the bugs, as laid out in documentary evidence. Such
 16 assessments are the province of the jury, and an expert’s testimony on this
 17 matter is not helpful. Worse yet, in making this assessment, Dr.
 18 Khoshgozaran cites only eleven out of at least 398 tickets related to the
 19 launch of the MVP in making this determination. Additionally, Dr.
 20 Khoshgozaran’s related opinion that a delay of about a month is “normal”
 21 for this type of project does not address whether Neofonie materially
 22 breached *this* agreement by failing to complete the Project by the agreed-
 23 upon deadline. As a result, this opinion is also likely to confuse and unduly
 24 prejudice the jury.

25 **Fourth**, Dr. Khoshgozaran’s opinion that Artissimo caused
 26 Neofonie’s inability to complete the project should be excluded because it
 27 is not based on any expertise. Dr. Khoshgozaran’s analysis is a summary
 28 of the documentary evidence presented in a light favorable to Neofonie.

1 The jury itself can make such a determination without any aid from an
 2 expert.

3 ***Fifth***, Neofonie should not be able to present any opinion of Dr.
 4 Khoshgozaran that relies upon documents that it has not produced to
 5 Artissimo, particularly since they were specifically requested in discovery.

6 For these reasons and as explained in more detail below, Artissimo
 7 asks that the proposed expert testimony of Ali Khoshgozaran, Ph.D., be
 8 excluded or, at the least, limited.

9 II. BACKGROUND

10 Artissimo and Neofonie entered into a written agreement under
 11 which Neofonie would develop a custom business-to-consumer website for
 12 Artissimo to use in selling a new line of high-end art products (the
 13 “Project”). The parties first entered into a contract for the development of
 14 a website concept and design for the Website. Upon completion of the
 15 design, on May 23, 2016, Artissimo and Neofonie executed a contract (the
 16 “Agreement”) for Neofonie to create an MVP for the Website that would
 17 be usable for Artissimo’s intended business purpose. (Ex. B.)

18 Neofonie understood that, due to the seasonal nature of Artissimo’s
 19 business model and intended business purpose, the website needed to be
 20 available for the 2016 holiday season. (*See* Ex. C [Excerpted Tr. of Dep. of
 21 Ender Oezguer, Rule 30(b)(6) representative of Neofonie] at 43:23–44:13
 22 (agreeing that “Neofonie knew that Artissimo needed the product in order
 23 to make the holiday season”). Accordingly, the Agreement provided that
 24 the artdesigns.com launch would be September 19, 2016. (Ex. B at 4.) But
 25 due to ongoing problems with completing the development of the website,
 26 the launch date was moved three times, eventually to the end of October.
 27 (Ex. C at 38:9–40:3.)

1 The Agreement required that Neofonie produce to Artissimo several
2 “deliverables,” including a “Go live / Launch of artdesigns.com MVP,” or
3 live website, by the agreed date. (Ex. B at 7, 11.) As Neofonie’s corporate
4 representative acknowledged, the Agreement provided that the MVP would
5 “contain the minimum features for . . . [artdesign.com]’s business model.”
6 (Ex. C at 32:7–13; *see also* Ex. B at 3 (“This MVP shall contain the
7 minimum feature set for the artdesigns.com business model[].”) Neofonie
8 had gained an understanding of that model during the first phase of the
9 Project. (Ex. C at 26:23–29:20.) Neofonie’s representative also agreed
10 that an MVP would not qualify as “delivered” if it was unable to be tested
11 or used by the consumer and failed in its stated purpose. (*Id.* at 37:3–19.)

12 However, when it came time to test the website, Artissimo
13 discovered multiple deficiencies relating to the basic usability of the
14 website for its business model. For example, Neofonie’s representative
15 acknowledged that the MVP would be required to calculate taxes in order
16 for Artissimo to sell to individuals in different jurisdictions in the U.S.,
17 Canada, and Mexico. (*See id.* at 28:14–29:20, 34:3–19.) Despite this
18 understanding, the MVP that Neofonie provided only estimated taxes; it
19 did not calculate the taxes based on jurisdiction, as required by law. (Ex. D
20 at 111:18–112:7.)

21 Neofonie attempted to correct these problems, but even after the
22 extensions, the MVP was not ready to launch. Neofonie’s representative
23 also agreed that the MVP was never launched due to the existence of
24 unresolved problems with the website:

25 Q. You agree that the MVP never launched?

26 A. Yes.

1 Q. And one of the reasons why it didn't launch is
 2 because there were still problems that hadn't been
 3 worked out; isn't that correct?

4 A. Yes.

5 (Ex. C at 63:7–12; *see also id.* at 64:14–22 (“Q. And it did not launch
 6 because there were blockers or problems that were preventing it [the MVP]
 7 from being launched. A. Yes. Q. And, therefore, because of those
 8 blockers or those problems, the MVP was never ready to be put on the
 9 production system? A. Never would be ready, as a conclusion of that,
 10 yes.”).

11 Neofonie sued Artissimo for breach of contract and other quasi-
 12 contractual claims on May 2, 2017. Artissimo filed a counterclaim for
 13 breach of contract and other quasi-contractual claims on July 5, 2017. On
 14 September 18, 2018, Neofonie disclosed the expert report of Dr.
 15 Khoshgozaran, which contained five opinions concerning Neofonie’s
 16 performance in the Project and Artissimo’s contributions thereto. (Ex. A.)
 17 As explained below, these opinions should not be presented to the jury.

18 **III. STANDARD OF REVIEW**

19 Rule 702 of the Federal Rules of Civil Procedure provides that “[a]
 20 witness who is qualified as an expert by knowledge, skill, experience,
 21 training, or education may testify in the form of an opinion or otherwise if”
 22 four conditions are met. First, “the expert’s scientific, technical, or other
 23 specialized knowledge” must “help the trier of fact to understand the
 24 evidence or to determine a fact in issue.” Fed. R. Civ. P. 702(a). Second,
 25 the expert’s testimony must be “based on sufficient facts or data.” Fed. R.
 26 Civ. P. 702(b). Third, the testimony must be “the product of reliable
 27 principles and methods.” Fed. R. Civ. P. 702(c). Fourth, the expert must
 28 have “reliably applied the principles and methods to the facts of the case.”

1 Fed. R. Civ. P. 702(d). Additionally, the court has discretion to exclude
 2 expert testimony “when its probative value is substantially outweighed by
 3 the danger of misleading the jury or confusing the issues.” *In re Hanford*
 4 *Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008) (citing Fed.
 5 R. Civ. P. 403).

6 **IV. ARGUMENT**

7 Under Rule 702, the trial court has a “gatekeeping obligation” to
 8 determine that any expert testimony is both relevant and reliable before the
 9 jury hears it. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).
 10 Thus, “the trial judge must determine at the outset . . . whether the expert is
 11 proposing to testify to (1) scientific [or technical] knowledge that (2) will
 12 assist the trier of fact to understand or determine a fact in issue.” *Daubert*
 13 *v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). The court should
 14 consider “whether the reasoning or methodology underlying the testimony
 15 is scientifically valid and of whether that reasoning or methodology
 16 properly can be applied to the facts in issue.” *Id.* at 592–93. “Ordinarily, a
 17 key question to be answered . . . will be whether it can be (and has been)
 18 tested.” *Id.* at 593.

19 Here, Dr. Khoshgozaran’s proposed testimony suffers from
 20 fundamental flaws that make it inappropriate for consideration by the jury.
 21 Artissimo does not question Dr. Khoshgozaran’s general qualifications to
 22 testify about the implementation of a business-to-consumer website.
 23 However, here, Dr. Khoshgozaran’s proposed testimony addresses facts
 24 that are not in issue (e.g., the industry standard for an MVP, a term that is
 25 defined by the Agreement), and such testimony is not ‘helpful to the trier
 26 of fact.’ Additionally, Dr. Khoshgozaran’s opinions as to whether *this*
 27 website was or was not functioning properly are not reliable because Dr.
 28 Khoshgozaran did not test the website. And to the extent that Neofonie

1 seeks to use Dr. Khoshgozaran to introduce testimony as to facts, such facts
 2 must be established by witnesses who have personal knowledge of such
 3 facts. Artissimo explains below how these issues impact each of Dr.
 4 Khoshgozaran's five proffered opinions. Artissimo further explains how
 5 Dr. Khoshgozaran's testimony should be excluded to the extent that
 6 Neofonie has not produced the documents on which such testimony relies.

7 **A. Dr. Khoshgozaran's First Opinion Should Be Excluded Because
 8 It Is Neither Helpful Nor Reliable.**

9 Dr. Khoshgozaran's first opinion is that Artissimo "failed to conform
 10 to important principles of Agile software development and MVP launch,"
 11 resulting in "unnecessary delays in development of the Website." (Ex. A at
 12 ¶ 90.) This testimony should not be presented to the jury because it is not
 13 reliable and because his analysis reveals that it does not relate to any issue
 14 in dispute in the case.

15 As a threshold matter, Dr. Khoshgozaran bases his opinion of
 16 Artissimo's approach to the Project on *one* out of 46¹ features required in
 17 the Agreement. (See Ex. A at ¶¶ 100–120 (discussing newsletter feature);
 18 Ex. B [Agreement] at 9–10 (listing features required to be delivered).) It
 19 simply is not reliable to base a conclusion about Artissimo's approach to
 20 the entire project on its approach to one feature.² Cf. *In re Countrywide*

22

23 ¹ Dr. Khoshgozaran himself counted "63 features and sub-features" as
 24 being required for the MVP (Ex. A at ¶ 96), making his decision to analyze
 the development of only one such feature even more perplexing.

25 ² Although Dr. Khoshgozaran states that he "was able to trace similar
 26 issues in other product features such as My Collections" (Ex. A at ¶ 121),
 27 he provides no further explanation of that statement. Therefore, he has
 28 presented absolutely no analysis to support that conclusion. In any event, a
 (footnote continued on following page ...)

1 *Fin. Corp. Mortg.-Backed Sec. Litig.*, 984 F. Supp. 2d 1021, 1033 (C.D.
 2 Cal. 2013) (“In order to draw reliable conclusions . . . based on a statistical
 3 sample, the sample size must be large enough to support those
 4 conclusions.”). Moreover, Dr. Khoshgozaran inexplicably chose a feature
 5 that is not in dispute in this litigation; Artissimo has not claimed that this is
 6 one of the features that blocked the go-live. As a result of these
 7 fundamental flaws, Dr. Khoshgozaran’s first opinion is unreliable as a
 8 matter of law.

9 Additionally, Dr. Khoshgozaran’s opinion is not helpful to the trier
 10 of fact because his analysis “does not relate to any issue in the case.”
 11 *Daubert*, 509 U.S. at 591. Dr. Khoshgozaran’s opinion relies on the
 12 industry standard for an MVP. (E.g., Ex. A at ¶¶ 57–64, 96.) If the
 13 Agreement did not define “MVP,” such testimony might be helpful.
 14 However, the Agreement explains *exactly* what is required for *this* MVP.
 15 (Ex. B at 9–10.) Giving the jury a definition of “MVP” that is inconsistent
 16 with the definition provided in the Agreement is not relevant or helpful to
 17 the trier of fact; it is confusing.

18 And there is no question that Dr. Khoshgozaran’s definition of an
 19 MVP is inconsistent with the definition in the Agreement. Dr.
 20 Khoshgozaran opines that the Agreement itself is not consistent with MVP
 21 and Agile development principles—specifically, that the one feature he
 22 analyzes is not an MVP feature and “what was scoped out” does not
 23 comport with standard MVP thinking. (Ex. A at ¶¶ 100, 104–06.) As a
 24 matter of law, the Agreement definition must control over an inconsistent

25 (... *footnote continued from previous page*)

26 demonstration of issues with two (out of 46) features would not greatly
 27 improve the reliability of the opinion.

28

1 industry definition. *See* Cal. Civ. Code § 1638. Thus, the expert testimony
 2 is not relevant under Rule 702.

3 The same conclusion—that the Agreement itself is the problem—
 4 demonstrates that Dr. Khoshgozaran’s opinion is not reliable for an
 5 additional reason. Dr. Khoshgozaran concludes that Artissimo alone did
 6 not follow an important principles of Agile software development and
 7 MVP launch. But under his own analysis, the *Agreement* was the source of
 8 the inconsistency with MVP principles. As both parties (including
 9 Neofonie, the party with expertise in website development) unquestionably
 10 agreed to the scope of the Agreement, this does not support a conclusion
 11 that *Artissimo* failed to follow correct development principles. Dr.
 12 Khoshgozaran’s opinion should be excluded for this additional reason.
 13 *See, e.g., United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000)
 14 (noting that “[w]hether the methodology or technique the expert uses ‘fits’
 15 the conclusions” is a “preliminary question[] of law” to be determined “by
 16 the trial judge”).

17 In short, testimony as to whether the agreed-upon features are
 18 consistent with the industry standard for an MVP is not helpful to the jury
 19 and should be excluded under Rule 702. Indeed, it is likely to confuse the
 20 jury by presenting two sets of MVP requirements, one of which did not
 21 govern this relationship. As a result, this opinion should also be excluded
 22 under Rule 403. Artissimo therefore moves that the first opinion be
 23 excluded from trial.

24 **B. Dr. Khoshgozaran’s Second and Third Opinions Should Be
 25 Excluded Because They Are Not Relevant.**

26 Dr. Khoshgozaran’s second opinion is that Neofonie “chose a widely
 27 practiced software development process and implemented it correctly in
 28 developing the Website.” (Ex. A at ¶ 91.) His third opinion is that

1 Neofonie struck “a balance between integrating third-party and existing
2 software components in developing them from scratch” and Neofonie’s
3 “decision to integrate out-of-the-box software components when applicable
4 and to avoid excessive use of such components were justified.” (*Id.* at
5 ¶ 92.) Dr. Khoshgozaran explains that he provides these opinions to rebut
6 Artissimo’s assertions that “Neofonie failed to implement best practices”
7 and undertook unnecessary customizations. (*Id.* at ¶¶ 124, 127.) However,
8 Artissimo does not plan to pursue these theories at trial.

9 Artissimo’s theory at trial is simple: Neofonie contracted to deliver
10 an MVP with certain features by a particular date and, despite multiple
11 extensions, it failed to do so. Neofonie also told Artissimo that it would
12 require additional payment to complete the Project and would again be
13 changing the Project Manager. Given Neofonie’s failure to meet the
14 agreed deadline and its repudiation of performance, Artissimo gave notice
15 that it was ending the relationship.

16 This theory does not involve whether Neofonie implemented best
17 practices or accrued unnecessary development hours; they depend on
18 whether Neofonie failed to do what it promised to do. Thus, Dr.
19 Khoshgozaran’s second and third opinions are expressly framed as being
20 responsive to arguments that Artissimo is not making at trial. Such
21 testimony is not relevant or helpful to the jury under Rule 702, and
22 Artissimo asks that it be excluded.

23 If the Court nevertheless allows Dr. Khoshgozaran to testify to these
24 opinions, Artissimo asks that Dr. Khoshgozaran not be permitted to testify
25 in the first instance to facts of which he has no personal knowledge. Much
26 of Dr. Khoshgozaran’s analysis for these two opinions consists of him
27 summarizing documentary evidence. (Ex. A at ¶¶ 125, 129, 132, 134,
28 139.) While an expert may properly rely on such evidence in formulating

1 his opinions, individuals with personal knowledge, not the expert, must
 2 introduce those facts into evidence. *See Oracle Am., Inc. v. Google Inc.*,
 3 No. C 10-03561 WHA, 2011 WL 5914033, at *1 (N.D. Cal. Nov. 28,
 4 2011) (“Expert reliance on foundational facts supplied by [a party] can be
 5 proper *so long as [the party’s employees] testify to the foundational facts*
 6 *with firsthand knowledge.*” (emphasis added)). This is particularly
 7 important because, as the Ninth Circuit has recognized in the context of
 8 expert summary witnesses, “[p]ermitting an ‘expert’ witness to summarize
 9 testimonial evidence lends the witness’ credibility to that evidence.”
 10 *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir. 1993), *as amended*
 11 (Dec. 13, 1993), *overruled on other grounds by United States v. Nordby*,
 12 225 F.3d 1053 (9th Cir. 2000). Artissimo therefore asks that the Court not
 13 allow Dr. Khoshgozaran to testify to any facts that Neofonie has not
 14 established through the testimony of other witnesses and place reasonable
 15 limits on Dr. Khoshgozaran’s summaries of testimony by other witnesses.

16 **C. Dr. Khoshgozaran’s Fourth Opinion Should Be Excluded
 17 Because It Is Neither Reliable Nor Helpful.**

18 Dr. Khoshgozaran’s fourth opinion is that Artissimo “did not
 19 accurately represent the severity of several bugs that were discovered in the
 20 course of developing the Website as well as [Neofonie’s] approach in
 21 addressing or resolving such bugs.” (Ex. A at ¶ 93.) To determine the
 22 severity of the bugs, Dr. Khoshgozaran relies upon evidence of
 23 communications between the parties. (*Id.* at ¶¶ 152, 155–60.)

24 As a threshold matter, like for the two prior opinions, it is not proper
 25 for Dr. Khoshgozaran to summarize the documentary evidence in lieu of
 26 testimony from witnesses with personal knowledge of the facts. Thus, if
 27 Neofonie does not present witnesses with personal knowledge to establish
 28

1 these facts, Artissimo moves that Dr. Khoshgozaran's testimony on this
 2 issue be excluded.

3 But even assuming that Neofonie meets this threshold requirement,
 4 Dr. Khoshgozaran does not have a reliable basis to testify that Artissimo
 5 "did not accurately represent the severity of several bugs that were
 6 discovered in the course of developing the Website." (Ex. A at ¶ 93.)
 7 "Proposed testimony must be supported by appropriate validation" and
 8 "[o]rdinarily, a key question to be answered . . . will be whether it can be
 9 (and has been) tested." *Daubert*, 509 U.S. at 590. If the opinion was not
 10 appropriately validated, it should be excluded as unreliable. *See id.*

11 Here, Dr. Khoshgozaran could have tested the website to accurately
 12 determine the severity of the bugs.³ His report acknowledges he failed to
 13 do so. He states: "I did not analyze artifacts such as actual source code or a
 14 live version of the Website that would allow me to form an opinion about
 15 the quality of delivered features at the end of the relationship between the
 16 two parties." (Ex. A at n.34.) Thus, Dr. Khoshgozaran *admits* that he does
 17 not have adequate information to evaluate the functionality of the
 18 "delivered features" but purports to do exactly that. And if he had no
 19 ability to access the delivered features, he also had no ability to determine
 20 which features were, in fact, delivered. In other words, Dr. Khoshgozaran
 21 concludes that Artissimo exaggerated the severity of the bugs in a website
 22 without having tested the functionality of the site about which he attempts
 23

24 ³ This assumes the cooperation of Neofonie. Dr. Khoshgozaran's report
 25 suggests that Neofonie did not provide that support, as he states: "I am
 26 willing to amend or supplement this report if such material is made
 27 available to me." (Ex. A at n.34.) It was Neofonie's responsibility to
 28 provide the information needed for its expert to make a reliable analysis.

1 to opine. Since Dr. Khoshgozaran himself has conceded that his opinion is
 2 not reliable, it should be excluded.

3 Moreover, instead of testing the website to determine the severity of
 4 the bugs, Dr. Khoshgozaran relied upon only a limited universe of
 5 documents showing others' opinions of the severity of the bugs. Dr.
 6 Khoshgozaran's report explains that the JIRA tickets are, *inter alia*,
 7 "created to report a bug identified in the software." (Ex. A at ¶ 47.) But
 8 Dr. Khoshgozaran does not adequately analyze those tickets.

9 On April 17, 2019, Neofonie produced 589 JIRA tickets to
 10 Artissimo. (Ex. E at ¶ 23.) Of these, 400 were marked "MVP Launch" and
 11 thirty (30) were marked "Public Launch Blocker."⁴ (*Id.* at ¶ 25.) Of the
 12 tasks marked "MVP Launch," forty (40) were not resolved by the final due
 13 date for the project: October 30, 2016. (*Id.* at ¶ 26.) Moreover, *none* of the
 14 tasks marked "Public Launch Blocker" were complete as of October 30,
 15 2016. (*Id.* at ¶ 27.) The *earliest* completion date listed for any such task
 16 was November 16, 2016; three were listed as completed after the alleged
 17 termination date of November 23, 2016, and five were never marked as
 18 completed. (*Id.*) Even Dr. Khoshgozaran's screenshot of the "Task Report
 19 from JIRA"—which does not account for which tasks were actually
 20 complete as of the due date for the MVP—acknowledges that these five
 21 tasks were never completed. (Ex. A at ¶ 165.)

22

23

24

25 ⁴ In citing to the JIRA tickets, Artissimo does not concede that all of the
 26 characterizations contained therein were accurate. This information simply
 27 demonstrates the unreliable nature of Dr. Khoshgozaran's conclusions,
 28 even using Neofonie's own data.

1 Dr. Khoshgozaran cites only seventeen distinct JIRA tickets in his
 2 report.⁵ Of these, eleven were marked “MVP Launch.” (Ex. E at ¶ 28.)
 3 According to Dr. Khoshgozaran, the 398⁶ tickets marked in this manner
 4 “represent[] the tasks related to the MVP product for Defendant.” (Ex. A
 5 at ¶ 97.) Given that the launch of the MVP is the subject of the dispute,
 6 these tickets are highly relevant. However, the report makes no effort to
 7 establish that this sample of approximately 2.7% of such tickets is
 8 somehow representative of the remainder of the “MVP Launch” tasks—
 9 much less representative of the tasks actually in dispute. The use of such a
 10 tiny sample, without establishing representativeness, makes Dr.
 11 Khoshgozaran’s reliability fundamentally unreliable. *See Countrywide*
 12 *Fin. Corp.*, 984 F. Supp. 2d at 1033.

13 Moreover, Dr. Khoshgozaran also notes the existence of the category
 14 “Public Launch Blocker” in JIRA. (*Id.*) Neofonie has acknowledged that
 15 launch blockers would prevent the website going live and thus cause the
 16 MVP to fail in its stated purpose. (Ex. C at 35:3–37:19, 100:9–25.) But
 17 inexplicably, Dr. Khoshgozaran’s report offers no explanation of the
 18 number of such tickets or their importance. This oversight also
 19 demonstrates the selective and unreliable nature of the report.

20

21 ⁵ See Ex. A at nn.39–43, 45, 55, 74–75, 77–78, 87–88 (citing specific JIRA
 22 tickets); *id.* at ¶ 175 (mentioning “there were at least 17 tickets in JIRA
 23 directly related to AX” but specifically identifying only five such tickets). Dr. Khoshgozaran also includes a screenshot showing thirteen JIRA tickets
 24 labeled as “Post MVP.” (Ex. A at ¶ 132.) These tickets do not relate to the
 25 other numbers of “MVP Launch” or “Public Launch Blockers” and
 26 therefore are not discussed above.

27 ⁶ Artissimo does not know the reason for the variation between the number
 28 of tickets described by Dr. Khoshgozaran and the number contained in
 Neofonie’s own documents.

1 Ultimately, because Dr. Khoshgozaran did not test the website, he
2 simply assessed the credibility of a limited universe of the parties'
3 discussions about website deficiencies. Even if the inadequate sample
4 were not an issue, the weighing of credibility is squarely the role of the
5 jury, and Dr. Khoshgozaran's testimony on this matter does not aid the jury
6 with his expertise. *See, e.g., United States v. Rivera*, 43 F.3d 1291, 1295
7 (9th Cir. 1995) ("[A]n expert witness is not permitted to testify specifically
8 to a witness' credibility or to testify in such a manner as to improperly
9 buttress a witness' credibility." (internal quotation omitted)). Thus, the
10 testimony should be excluded because it is neither helpful nor reliable.

11 Finally, in connection with his fourth opinion, Dr. Khoshgozaran
12 also opines that "[a] delay of about a month is very common for a project
13 of this magnitude." (Ex. A at ¶ 151.) This is not helpful to the jury and
14 unduly prejudicial under Rule 403. A critical question for the jury here is
15 whether Neofonie breached the Agreement by not timely delivering the
16 MVP—a deliverable that was more than two months overdue (under the
17 Agreement) at the time the relationship ceased. While it may be
18 "common" for this to occur under certain circumstances, the parties are free
19 to contract otherwise, and thus the frequency of the issue does not affect
20 Neofonie's obligations under the Agreement. However, an expert
21 essentially telling the jury, "that's no big deal, it happens all the time," will
22 necessarily unduly prejudice Artissimo's argument by implicitly answering
23 the *legal* question of whether Neofonie's breach was material. Because the
24 probative value is extremely limited and the risk of prejudice severe, this
25 testimony should also be excluded.

1 **D. Dr. Khoshgozaran's Fifth Opinion Should Be Excluded Because**
2 **It Is Not Helpful.**

3 Finally, Dr. Khoshgozaran opines that Neofonie "was unable to
4 successfully complete the development of the Website due to [Artissimo's]
5 inability or unwillingness to take several necessary actions that would
6 unblock Plaintiff and would enable it to successfully complete the
7 development of the Website." (Ex. A at ¶ 94.) However, Dr.
8 Khoshgozaran's analysis is essentially a summary of the documentary
9 evidence in this case presented in a light favorable to Neofonie. For
10 example, Dr. Khoshgozaran states: "Based on my analysis of JIRA tickets
11 and relevant email exchanges between the Defendant and Plaintiff, this
12 important prerequisite [obtaining a Magnolia license] was not provided to
13 Plaintiff despite numerous requests made to the Defendant in the course of
14 several months." (*Id.* at ¶ 169; *see also*, e.g., *id.* at ¶ 165 ("[a] study of
15 tickets created through JIRA illustrates . . ."); *id.* at ¶¶ 166–67 ("The
16 following graph, also generated by JIRA, illustrates . . .").)

17 This is not "expert" testimony. Dr. Khoshgozaran has merely read
18 communications between the parties and reached a conclusion as to what
19 those communications mean. But such testimony does not "help the trier
20 of fact to understand the evidence or to determine a fact in issue." Fed. R.
21 Civ. P. 702(a). A jury is perfectly capable of interpreting the meaning of
22 communications between the parties without the "assistance" of an expert.
23 Moreover, use of an expert to introduce Neofonie's preferred conclusions
24 as to the meaning of such evidence is improper, as the jury may weigh the
25 expert's opinion disproportionately merely by virtue of his qualification as
26 an expert. Thus, if there is any probative value in Dr. Khoshgozaran's
27 "opinions" as to the meaning of such documents, it is significantly
28

1 outweighed by the risk of prejudicing the jury. As a result, this opinion
 2 should be excluded under both Rule 403 and Rule 702.

3 Lastly, the testimony of Neofonie’s corporate representative directly
 4 contradicts Dr. Khoshgozaran’s “opinion,” which means this testimony
 5 cannot be helpful to the jury. Dr. Khoshgozaran states that the Magnolia
 6 license was an “important prerequisite” to completing development of the
 7 website and that “numerous tasks . . . depend[ed] on or were blocked by”
 8 whether Artissimo had purchased this license. (Ex. A at ¶¶ 168–69, 171.)
 9 However, Neofonie’s representative admitted that the lack of Artissimo
 10 having its own Magnolia license did not impede development of the
 11 website and that Neofonie was able to do everything up to go live without
 12 that license. (Ex. C at 76:3–78:10.) It cannot be helpful for the jury to hear
 13 an expert’s contrary “opinion” about a fact that Neofonie has already
 14 admitted. Thus, the opinion should be excluded for this additional reason.

15 **E. Neofonie Should Not Be Permitted to Rely on Documents It Has
 16 Not Produced, and the First, Second, and Third Opinions Should
 17 Be Excluded for This Additional Reason.**

18 On October 24, 2018, Artissimo served its Second Set of Requests
 19 for Production of Documents and Things on Neofonie, which was based
 20 largely on the expert report served the month beforehand. (See Ex. F
 21 [Artissimo’s Second Set of Discovery Requests].) This included, *inter*
 22 *alia*, requests for Neofonie to produce “ANY DOCUMENTS or other
 23 materials that the EXPERT was provided or given access to by
 24 NEOFONIE, its counsel, or ANY other PERSON REGARDING the
 25 subject matter of the above-captioned action.” (Ex. F at 7.)

26 On the required response date, Neofonie objected to every single
 27 request and did not produce, or agree to produce, a single document. (Ex.
 28 E at ¶ 11; Ex. G [Neofonie’s Responses to Artissimo’s Second Set of

1 Discovery Requests].) At a subsequent meet and confer, Neofonie’s
2 counsel agreed to produce the documents that were given to Dr.
3 Khoshgozaran, but then refused to do so for months. (Ex. E at ¶¶ 14–22.)
4 After repeated requests, Neofonie finally made a limited production of
5 materials related to its expert in April 2019, consisting of the expert’s
6 curriculum vitae, his bills with descriptions of services redacted, the
7 engagement agreement, and a handful of emails between Neofonie and
8 Artissimo. (*Id.* at ¶ 24.) As discussed above, Neofonie also produced the
9 JIRA tickets, which it had previously withheld, on April 17, 2019. (*Id.* at
10 ¶ 23.)

11 Nevertheless, documents referenced in the expert report remain
12 absent from Neofonie’s production—including documents that Artissimo
13 does not have. Each of Dr. Khoshgozaran’s opinions expressly state that
14 they are based on certain documentary evidence, but some of that evidence
15 has not been produced. In particular, Dr. Khoshgozaran repeatedly relies
16 upon pages from Neofonie’s Confluence software that, to the best of
17 Artissimo’s knowledge, have not been produced. Unfortunately, Dr.
18 Khoshgozaran identifies these pages by their web addresses alone—
19 without dates, titles, or other identifiable information that would allow the
20 identification of such documents. He describes them only in terms of their
21 most general subject matter, such as “services related to newsletters
22 (Mailchimp)” and, “sending emails (Mandrill).” (Ex. A at ¶ 129.)
23 Although the nature of these references makes locating the documents
24 difficult, Artissimo has searched Neofonie’s production (and its own) for
25 these documents and cannot find any that meet these descriptions. Based
26 on the information provided, there are at least fifteen unique documents
27
28

1 referenced that Neofonie did not produce and that Artissimo does not
 2 otherwise have. (*Id.* at ¶¶ 121, 125, 129, 134.)⁷

3 Neofonie should not be permitted to rely upon, or introduce expert
 4 testimony that relies upon, documents that it has not produced in this
 5 litigation. *See, e.g.*, Fed. R. Civ. P. 37(c); *Optional Cap., Inc. v. Kyung*
 6 *Joon Kim*, No. CV043866ABCPLAX, 2008 WL 11336496, at *7 (C.D.
 7 Cal. Jan. 17, 2008). Such documents are directly responsive to document
 8 requests served, and allowing Neofonie's reliance on such documents at
 9 trial would be fundamentally unfair to Artissimo.

10 As a result, Dr. Khoshgozaran should not be permitted to provide
 11 any opinion based on documents that have not been produced. The missing
 12 documents relate to the first, second, and third opinions in the report. In
 13 the case of the first opinion, the report attempts to use the missing
 14 document to demonstrate that Dr. Khoshgozaran's opinion that Artissimo
 15 failed to follow Agile principles of development with respect to the
 16 newsletter can be extrapolated to other features. (Ex. A at ¶ 121.) As this
 17 is the *only* document relied upon to extend the opinion in this matter, it is
 18 of great importance and justifies exclusion of the first opinion.

19 As to the second opinion, Dr. Khoshgozaran heavily relies upon
 20 documents that were not produced to support his conclusion that Neofonie
 21 "closely followed" "several key components that exist in almost any
 22 complex software development project that utilizes Agile methodologies"
 23 during Phase Two. (*Id.* at ¶ 125.) Indeed, five of the nine unique
 24 documents that Dr. Khoshgozaran relied upon were not produced. (*See id.*,
 25

26 ⁷ The only document referenced in these paragraphs that Artissimo has is
 27 the document referenced in footnote 61.

28

1 nn.56, 59, and 60.)⁸ This conclusion is the main thrust of the opinion—the
2 basis for concluding that Neofonie did the implementation “correctly.” As
3 such, Neofonie should not be permitted to introduce an opinion
4 substantially based on documents it did not produce.

5 With respect to the third opinion, Artissimo does not have even one
6 of the eight documents that Dr. Khoshgozaran identified as demonstrating
7 that Neofonie chose “several external software components and services to
8 be integrated into the Website rather than developing them from scratch.”
9 (*Id.* at ¶ 129.) This goes directly to the expert’s opinion that Neofonie was
10 not engaging in excessive development of features from scratch, and thus,
11 Neofonie’s failure to produce these critical documents should preclude
12 introduction of the opinion.⁹

13 **V. CONCLUSION**

14 For the foregoing reasons, the proposed expert testimony of Ali
15 Khoshgozaran, Ph.D., should be excluded or, at the least, limited to ensure
16 relevance and reliability.

17
18 Dated: September 9, 2019
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25 ⁸ The document referenced in footnote 58 was not produced, but appears to
26 be one of the documents referenced in footnote 56. (*Id.*)

27 ⁹ Neofonie has also failed to produce, and thus Artissimo remains without,
28 another Confluence page referenced in this opinion. (*Id.* at ¶ 134.)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kimberly M. Ingram, do hereby certify that on this 9th day of September, 2019, a true and correct copy of the foregoing document is being forwarded to the individual listed below in the manner indicated:

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